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No. 07-691

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IN THE
Supreme Court of the United States

KEVIN DALE, *et al.*,

Petitioners,

v.

STEPHENS COUNTY, GEORGIA SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

I. THIS CASE PRESENTS AN INTER-CIRCUIT CONFLICT REGARDING A QUESTION OF SUBSTANTIAL IMPORTANCE

This case presents a recurring question left unresolved by the decision in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989)--whether the Due Process Clause is violated when a government entity's action creates or increases a danger that results in the deprivation of life or liberty.

DeShaney held that the Due Process Clause does not impose on the states a general obligation to protect the life, liberty, and property of the public at large. 489 U.S. at 195. The Court explained, however, that such an obligation could arise out of the special duty of care and protection owed to prisoners and others whose ability to provide for themselves has been limited by official action. 489 U.S. at 198-99. *DeShaney* did not resolve whether, in addition to such individuals with whom the state has a special relationship, the protections of the Due Process Clause might apply in other discrete circumstances. The court's opinion, however, repeatedly stressed that the state in *DeShaney* "played no part in creating" the danger that resulted in the serious injuries to the victim in that case. 489 U.S. at 197; see *id.* at 201 (state "played no part in the [ ] creation" of the dangers"; state "played no part in creating" the danger).

In the wake of *DeShaney*, the courts of appeals have reached conflicting conclusions regarding whether a Due Process violation might arise in a case in which, unlike *DeShaney* itself, the state had indeed

created or increased the danger to an individual and by so doing had caused a deprivation of liberty or life. That is the issue framed and resolved by the litigation in the court below. The petitioners alleged that respondent Stephens County School Board, by withholding information regarding misconduct by Joey Wilson, had led the White County School Board to hire Wilson as a teacher, putting Wilson in a position in which he was able to molest petitioners M.D. and A.C.

In the court of appeals, respondent asserted that *DeShaney* required dismissal of petitioners' complaint, insisting that under that decision the allegations of the complaint--even if true--did not constitute a constitutional violation.[1] Petitioners argued in response that respondent's action was unconstitutional because the conduct of the Stephens County School District "[u]nlike *DeShaney*, . . . rendered the minor Plaintiffs vulnerable to Wilson when they otherwise would not have been."[2] The Eleventh Circuit sustained respondent's *DeShaney* argument.

Even if the School District's actions had indeed created the danger (and thus led to the injury) in question, the Eleventh Circuit held, the District could not be held liable because the danger was posed by, and the injury was inflicted by, an individual who at the time of the injury was not an agent or employee of the District. "[L]ocal governments can never be liable . . . for acts of those whom the local government has no

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[1] Brief of Appellant Stephens County School District, pp.15-17.

[2] Brief of Appellees Kevin and Abby Dale, et al., p.20.

authority to control." (App. 3)(*quoting Turquitt v. Jefferson County*, 137 F.3d 1285, 1292 (11th Cir. 1998)(en banc)). That holding of the Eleventh Circuit effectively barred any Due Process claim based on a state-created danger, because in such cases the injury is invariably at the hands of an individual "whom the local government has no authority to control." In adopting this bar the Eleventh Circuit expressly relied on *DeShaney*. (App. 3).[3] In this Court respondent insists that *DeShaney* indeed precludes such state-created danger claims.[4]

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[3] Other circuits, in holding to the contrary that a government entity can violate the constitution by creating a danger of violence by a private party, have insisted that *DeShaney* itself established that rule.

> The Supreme Court has declared, "[a]s a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney* . . . . However, in *DeShaney* the Court recognized two exceptions, known as the "special relationships" and "state created danger" exceptions."

Beck v. Wilson, 377 F. 3d 884, 889 (8th Cir. 2004).

[4] Br.Op. 10 ("The Eleventh Circuit's reasoning and holding clearly follows from this Court's decision in *DeShaney*"), 11 ("The decision by the Eleventh Circuit follows this Court's . . . decision in *DeShaney*"), 12 ("Petitioners' claims undoubtedly fail under *DeShaney*. SCSD had no ability to control Joey Wilson's conduct . . . . The Eleventh Circuit's determination SCSD could not be liable for the actions of those 'whom the local government has no authority to control' follows *DeShaney* . . . ."), 14 ("Following the principles established in . . . *DeShaney*, the Eleventh Circuit correctly held that local government can never be liable under Section 1983 for the acts of those whom the local government has no authority to control.'")

The Fifth Circuit too has held that *DeShaney* does not permit the imposition of liability because a state-created danger caused a deprivation of life or liberty. *Farr v. Rodriguez*, 2007 WL 4260940 *3 (5th Cir., Dec. 5, 2007)("Farr also asserts a claim for a 'state-created danger' . . . , but we have refused to recognize that theory."); *Longoria v. Texas*, 473 F. 3d 586, 593 n. 8 (5th Cir. 2006)("Longoria . . . argues that his rights were violated under a state-created-danger theory. This circuit has never sustained a § 1983 claim predicated upon the state-created danger theory, and we decline to do so today. . . . [W]e have explicitly rejected this theory of liability."); *Beltran v. City of El Paso*, 367 F. 3d 299, 307 (5th Cir. 2004)("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability . . . ."); *Rivera v. Houston Ind. School Dist.*, 349 F. 3d 244, 249 (5th Cir. 2003)("we have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. . . . We again decline to do so.")

On the other hand, eight circuits have adopted the state-created danger theory, expressly holding that that doctrine applies in cases in which--as in the instant case--the created danger concerned risk of injury by, and the harm was indeed inflicted by, a person whom the state defendant "ha[d] no authority to control." In general "courts have used the 'state created danger label' to describe the state's duty to protect a person from *private* violence when the state itself has placed that person at risk." *Pena v. Deprisco*, 432 F. 3d 98, 108 (2d Cir. 2005)(emphasis added). See *id.* at 108-11 (constitution violated if "state officials communicate to a *private person* that he or she will not be arrested,

punished, or otherwise interfered with while engaging in misconduct likely to endanger the life, liberty or property of others")(emphasis added); *D.R. v. Middle Bucks Area Technical Schl.*, 972 F. 2d 1364, 1374 ("[l]iability under the state-created danger theory is predicated upon the states' affirmative acts which work to plaintiffs' detriment in terms of exposure to danger"), 1375 (state-created danger involves a significant "level of intermingling of state conduct with *private* violence")(emphasis added) (3d Cir. 1992)(en banc)(opinion joined by Alito, J.); *Kallstrom v. City of Columbus*, 136 F. 3d 1055, 1066 (6th Cir. 1988)("[l]iability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to *private* acts of violence.")(emphasis added); *Stevens v. Umstead*, 131 F.3d 697, 704 (7th Cir. 1997)(state-created danger doctrine is an "exception to the no duty to protect individuals from actions of *private* actors rule")(emphasis added); *James ex rel. James v. Friend*, 458 F. 3d 726, 729 (8th Cir. 2006)("Generally, the due process clause does not require the state to protect an individual against *private* violence. . . . The state is required, however, to protect individuals who . . . are subject to a state-created danger.")(emphasis added); *Kennedy v. City of Ridgefield*, 439 F. 3d 1055, 1061 (9th Cir. 2006)("although the state's failure to protect an individual against *private* violence does not generally violate the guarantee of due process, it can where the state 'affirmatively place[s] the plaintiff in a position of danger.'")(emphasis added); *United States v. Koon*, 34 F. 3d 1416, 1447-48 (9th Cir. 1994)(in the Ninth Circuit state-created danger cases "the third persons who inflicted the victims' injuries, in fact, were not state

actors"); *Moore v. Guthrie*, 438 F. 3d 1036, 1042 (10th Cir. 2006)("The danger creation doctrine makes a state official liable for the *private* violence of third parties if that official created the danger that caused the harm and the official's conduct was conscience shocking.")(emphasis added); *Butera v. District of Columbia*, 235 F. 3d 637, 651 (D.C.Cir. 2001)("under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from *third-party* violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm.")(emphasis added).

The two Eighth Circuit cases relied on by respondent both concluded that under *DeShaney* government entities may violate the constitution by creating a danger of injury by private parties. *Shrum v. Kluck*, 249 F. 3d 773, 781 (8th Cir. 2001)("This court has recognized two exceptions to the state's exemption from protecting its citizens from the deeds of *private* actors . . . (2) when the state is responsible for placing an individual in a position of danger which otherwise would not exist.")(emphasis added); *Doe v. Wright*, 82 F. 3d 265, 268 (8th Cir. 1996).

The inter-circuit conflict regarding the state-created danger doctrine is well recognized. The First Circuit noted that several circuit courts have recognized the existence of a

> constitutional violation when, on particular facts, the state fails to protect against *private* violence under this state created danger theory. . . . One circuit has flatly rejected the theory.

> *See Beltran v. City of El Paso*, 367 F. 3d 299, 307 (5th Cir. 2004).

Rivera v. Rhode Island, 402 F. 3d 27, 35 (1st Cir. 2005)(emphasis added). In *Pena v. Deprisco*, the Second Circuit pointed out that although

> a majority of our sister circuits . . . recogniz[e] that a state created danger can be the basis of a substantive due process violation . . . . the Fifth Circuit has confined liability to situations involving "special relationships described by the Supreme Court [in *DeShaney*], which are limited to cases concerning 'incarceration, institutionalization, or other similar restraint of personal liberty.'" *Beltran v. City of El Paso*, 367 F. 3d [at] 307.

432 F. 3d at 108 and 109 n. 12.

In addition to this conflict over whether the Due Process Clause can be violated by a state-created danger, "there is considerable variation among the circuits in their application of the state-created danger doctrine." *King v. East St. Louis School Dist. 189*, 496 F. 3d 812, 818 n. 3 (7th Cir. 2007). "[T]he circuit courts have yet to construct a unified approach either to the state-created danger inquiry or to the role that causation should play in the analysis." *Kennedy v. City of Ridgefield*, 439 F. 3d at 1074 (Bybee, J., dissenting). For example, several circuits that have adopted the state-created danger doctrine have held that the constitution is violated by such conduct only if the government's action is so egregious as to "shock the conscience." *Pena v. Deprisco*, 432 F. 3d at 112-14; *Bright v. Westmoreland County*, 443 F. 3d 276, 281 (3d Cir. 2006); *Moore v. Guthrie*, 438 F. 3d

at 1042. The Ninth Circuit, however, has held that the constitution is violated by danger-creating government action that manifests deliberate indifference. *Kennedy v. City of Ridgefield*, 439 F. 3d 1055, 1064 (9th Cir. 2006). In *Hart v. City of Little Rock*, 432 F. 3d 801 (8th Cir. 2005), the Eighth Circuit applied a deliberate indifference standard, and criticized the Sixth Circuit for having improperly applied a negligence standard. 432 F. 3d at 808 (the Sixth Circuit in *Kallstrom v. City of Columbus*, 136 F. 3d 1055 (6th Cir. 1998) "erroneously applied a negligence standard instead of the subjective deliberate indifference standard").

> While all of these tests share the key element of State endangerment, namely, affirmative conduct by State actors, . . . they are inconsistent in their elaborations of the concept. For example, the circuits have adopted different nexus requirements, . . . and employed different degrees of specificity in defining actionable conduct.

Butera v. District of Columbia, 235 F. 3d at 654.

Uncertainty about the scope of the state-created danger doctrine has led to a series of sharply divided en banc decisions. See *D.R. v. Middle Bucks Area Vocational Technical Schl.*, 972 F. 3d at 1377 (dissenting opinion joined by Judges Sloviter, Mansmann, Scirica and Nygaard), 1384 (dissenting opinion by Judge Becker); *Pinder v. Johnson*, 54 F. 3d 1169, 1179 (4th Cir. 1995)(en banc)(dissenting opinion joined by Judges Russell, Ervin, Murnaghan and Michael); *Kennedy v. City of Ridgefield*, 440 F. 3d 1091, 1091-92 (9th Cir. 2006)(Tallman, Kozinski, O'Scannlain, Kleinfeld, Gould,

Bybee, Callahan and Bea, JJ., dissenting from denial of rehearing en banc).

Respondent contends that *DeShaney* mandated the holding of the Eleventh Circuit, and thus effectively bars invocation of the state-created danger doctrine. Respondent relies on the statement in *DeShaney* that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." (Br. Op. 11, *quoting DeShaney*, 489 U.S. at 195). But this passage means only that the Due Process Clause does not contain such a *general* requirement applicable in all situations; it does not mean that the Clause never imposes such an obligation. *DeShaney* itself expressly recognizes that there is at least one type of situation in which the government has just such an obligation; there is a constitutional duty to protect from invasion by private actors the lives and liberty of individuals in state custody. "In *Youngberg v. Romeo*, 457 U.S. 306 (1982), we [held] . . . that the . . . Due Process Clause requires the State to provide involuntarily committed patients with such services as are necessary to ensure their 'reasonable safety' from . . . others." 489 U.S. at 199. *Youngberg* upheld, inter alia, the claim of the plaintiff in that case that the state was obligated to protect him from injuries inflicted by mentally retarded residents of a state institution, individuals who themselves clearly were "private actors." *Youngberg*, 457 U.S. at 310; see *Hutto v. Finney*, 437 U.S. 678, 682 (1978)(constitutional violations in prison included failure to protect inmates from stabbings and rape by other inmates).

Respondent insists that "many of the decisions from those Circuits [recognizing the state-created danger doctrine] have refused to impose such liability in educational settings." (Br. Op. 15). To the contrary, neither of the cases relied on by respondent held that the state-created danger doctrine can never be applied to the actions of school officials. In *D.R. v. Middle Bucks Area Vocational Tech. Schl.*, 972 F. 2d 1364 (3d Cir. 1992)(en banc), the court expressly applied that doctrine to the claim against the defendant school, rejecting the claim in that particular case only after concluding that the evidence failed to demonstrate that the school's conduct had "created or increased plaintiffs' risk of danger." 972 F. 2d at 1375. Similarly, in *King v. East St. Louis School Dist. 189*, 496 F. 3d 812 (7th Cir. 2007), the Seventh Circuit held that a school board could indeed be found liable for creating a danger to a student if its conduct was "shocking [to] the conscience." 496 F. 3d at 818. The court of appeals concluded that no constitutional violation had occurred in that specific case only because the action of the responsible school officials was no worse than "simple negligence." 496 F. 3d at 819.

II. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Respondent contends that it could not have foreseen that its actions, in withholding information from and recommending Wilson to the White County School District, would result in injury to petitioners M.D. and A.C. (Br. Op. 18). The district judge, however, concluded there was a "genuine issue of material fact that SCSD's alleged policy of concealing Wilson's misconduct shows deliberate indifference to plaintiffs' constitutional right

to bodily integrity and that the policy was the direct cause of plaintiffs' injury." (App. 38-39). Although respondent appealed this aspect of the District Court decision, the court of appeals dismissed the complaint without reaching that fact-bound dispute. If the Court grants review and upholds the legal sufficiency of petitioners' claims, respondent would be free on remand to renew this challenge to the sufficiency of the evidence.

The alleged sexual molestation which gave rise to the instant case also is the subject of the claims in *Dale v. White County School Board*, No. 07-691. Although the questions presented in these two cases are distinct, the underlying factual disputes are inextricably intertwined. Neither defendant yet acknowledges that petitioners M.D. and A.C. were molested; however, a trial of those claims would likely air a looming dispute between the two school districts as to which of the districts was primarily responsible for the injuries to petitioners.[5] Under these circumstances, we urge the Court to grant certiorari in both cases and set them for argument in tandem.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

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[5] Respondent Stephens County School District suggests that the information it withheld was so unimportant that it would "have never alerted WCSD to the possibility" that sexual molestation might occur. (Br. Op. 18). In deposition testimony, however, an official of the White County School District insisted that District would never have hired Wilson had it had the suppressed information. Deposition of Tammy Mize, pp. 79-80, 203-05.

Respectfully submitted,

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